DZH

268 NLRB No. 198

D--1213
Southfield, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MACCABEES MUTUAL LIFE
INSURANCE COMPANY

and

Case 7--CA--22319

INSURANCE WORKERS INTERNATIONAL
UNION, AFL--CIO

CORRECTION

On 29 February 1984 the National Labor Relations Board issued the above-captioned Decision and Order. Please correct your copy to include Case 7--CA--22319 in the caption.

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CORRECTION

On 29 February 1984 the National Labor Relations Board issued a Decision and Order in the above-captioned case.

On page 7 the unit should read:

All employees employed by the Company at its Southfield place of business; but excluding executives, private secretaries, department managers and assistant department managers, all others serving in a managerial capacity, guards and supervisors as defined in the Act.

The attached notice will replace your copy.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Insurance Workers International Union, AFL--CIO, as the exclusive representative of all the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the following appropriate unit and honor, abide by, and comply with all terms and conditions of employment set forth in the existing agreement:

> All employees employed by the Company at its Southfield place of business; but excluding executives, private secretaries, department managers and assistant department managers, all others serving in a managerial capacity, guards and supervisors as defined in the Act.

WE WILL recognize the employees employed as claims representatives, senior claims analysts, claims analysts, and claims analyst trainees as part of the appropriate unit, recognize the Union as collective-bargaining representative of these employees, and apply the terms and conditions to them.

WE WILL make employees whole for any losses they incurred as a result of our refusal to apply the terms of our collective-bargaining agreement to them with interest.

MACCABEES MUTUAL LIFE INSURANCE COMPANY
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamarra Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313--226--3244.

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INSURANCE WORKERS INTERNATIONAL
UNION, AFL--CIO

DECISION AND ORDER

Upon a charge filed by the Union 1 July 1983, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint 20 July 1983 against Maccabees Mutual Life Insurance Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that, since about 1950, the Union has been the exclusive collective-bargaining representative of a unit of employees employed by the Company. The complaint further alleges that on 7 January 1983, in a decision and order issued by the Regional Director for Region 7 in Case 7--UC--239, the Company's request that the unit be clarified by excluding the claims representatives, senior claims analysts, claims analysts, and claims analysts trainees from the unit was denied, the Company's petition was dismissed, and the unit was found to include these employees. The complaint also alleges that on 28 February 1983 the Company's request for review of that decision and order was denied by the Board. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules

and Regulations, Secs. 102.68 and 102.69(g), amended 9 Sept. 1981, 46 Fed. Reg. 45922 (1981); Frontier Hotel, 265 NLRB No. 46 (9 Nov. 1982).) The complaint further alleges that since 19 May 1983 the Company has refused to bargain with the Union. On 29 July 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 10 August 1983 the General Counsel filed a Motion for Summary Judgment. On 18 August 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company has not filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint the Company admits that it has refused, and continues to refuse, to recognize the Union as the exclusive bargaining agent for claims representatives, senior claims analysts, claims analysts, and claims analysts trainees, and has refused, and continues to refuse, to include them as part of the unit covered by the Company's collective-bargaining agreement with the Union. While the Company admits that its unit clarification petition in Case 7--UC--239 requesting exclusion of the above-noted employees from the unit was dismissed, and that its request for review of that dismissal was denied, the Company asserts that the dismissal was in error because the employees in question were, and continues to be, managerial employees. The Company has presented no new evidence in support of these contentions; rather it asserts that its actions do not violate Section 8(a)(5) and (1) of the National Labor Relations Act because the decision and order in Case 7--UC--239 was erroneous.

Counsel for the General Counsel contends that Respondent is raising issues which were considered and resolved in the representation case, and that this it may not do. We agree with the General Counsel. As noted in its answer, the Company does not deny the essential elements of the refusal-to-bargain allegation, but attacks the determination made in the unit clarification proceeding. In so doing, the Company renews its position concerning the makeup of the unit while presenting no new evidence.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation unit clarification proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.[1]

On the basis of the entire record, the Board makes the following:

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[1] Chairman Dotson was not on the panel in the underlying unit clarification proceeding but he accepts the result reached there for institutional reasons. Accordingly, he joins in granting the Motion for Summary Judgment.

Findings of Fact

I. Jurisdiction

The Company is a corporation engaged in the sale and service of life and health insurance, and has maintained its home office and place of business at 25800 Northwestern Highway in Southfield, Michigan. The Company maintains other places of business throughout the United States, Puerto Rico, and Canada. During the year ending 31 December 1982, a representative year, the Company had gross revenues in excess of $1 million and the Company received at its Southfield, Michigan place of business premium payments in excess of $50,000, which were delivered there directly from points located outside the State of Michigan. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Unit Clarification

As a result of the unit clarification petition filed by the Company 25 May 1982, a hearing was held 12 October 1982 to determine whether claims representatives, senior claims analysts, claims analysts, and claims analysts trainees should be excluded from the following appropriate unit for which the Union is the certified exclusive representative:

> All employees employed by Respondent at its Southfield place of business, but excluding executives, private secretaries, department heads, assistant department heads and all other supervisors as defined in the Act.

The Regional Director decided, on 7 January 1983, that the appropriate unit should include claims representatives, senior claims analysts, claims analysts, and claims analysts trainees, and dismissed the Respondent's petition. The Company's request for review of that decision and order was

denied by the Board on 28 February 1983. The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal To Bargain

Since on or about 19 May 1983, the Union has requested the Company to bargain concerning the employees involved in the unit clarification petition, and to include them as part of the unit covered by the parties' collective-bargaining agreement. Since on or about 19 May 1983, the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 19 May 1983 to bargain with the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union as exclusive representative of all employees in the certified unit including those employees involved in the underlying unit clarification petition, and, if an understanding is reached, to embody the understanding in a signed agreement.

We shall also order the Respondent to comply with the collective-bargaining agreement, with respect to the disputed employees, retroactively to the date it commenced its unfair labor practices and for the balance of its term, and to make the affected employees whole for any losses they incurred as the result of the Respondent's refusal to abide by the terms of such

agreement. Backpay is to be computed in a manner consistent with Board policy as set forth in Ogle Protection Service, 183 NLRB 682 (1970), with interest thereon as set forth in Florida Steel Corp., 231 NLRB 651 (1977). In addition, we shall require the Respondent to make the appropriate trust funds whole for losses suffered during the same period as a result of the Respondent's failure to adhere to the collective-bargaining agreement.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Maccabees Mutual Life Insurance Company, Southfield, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Insurance Workers International Union, AFL--CIO, as the exclusive bargaining representative of all the employees in the bargaining unit including those employes involved in the unit clarification petition.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are not governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See Merryweather Optical Co., 240 NLRB 1213, 1216 at fn. 7 (1979).

(a) Recognize the employees employed as claims representatives, senior claims analysts, claims analysts, and claims analyst trainees as part of the appropriate unit, recognize the Union as the collective-bargaining representative of these employees, and apply the terms and conditions of the collective-bargaining agreement to them.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit and honor, abide by, and comply with all employment set forth in the existing agreement:

> All employees employed by Respondent at its Southfield place of business; but excluding executives, private secretaries, department managers, all others serving in a managerial capacity, guards and supervisors as defined in the Act.

(c) Make whole the employees in the above unit for any losses they may have incurred as a result of the Respondent's refusal to apply the terms of the collective-bargaining agreement to them, in the manner set forth in the section herein entitled ''The Remedy.''

(d) Post at its facility in Southfield, Michigan, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 29 February 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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MACCABEES MUTUAL LIFE INSURANCE COMPANY
(Employer)

Dated ---------- By ----------
(Representative) (Title)

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